



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Office of General Counsel, Natural Resources Section

MARCH 24, 2015

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On behalf of: Kirby Marine, LP

By UPS, Delivery Confirmation

Re: Presentation to Responsible Party of an Interim Claim for Natural Resource Damage Assessment and Restoration Planning Costs for the *Texas City Y* oil spill, Pursuant to 33 U.S.C., Section 2713

Background:

I am writing on behalf of the National Oceanic and Atmospheric Administration ("NOAA"), in its capacity as a federal trustee for natural resource damage assessment.

A natural resource damage assessment is being conducted following the March 22, 2014 collision between the bulk carrier M/V SUMMER WIND 9114129 and KIRBY BARGE 27706 in the Houston Ship Channel.<sup>1</sup> As a result of the collision, the #2 starboard tank of KIRBY 27706 was punctured, discharging oil into state and federal waters of the Gulf of Mexico, ("Texas City Y Spill" or "Incident"). You, or an organization that you represent – namely, Kirby Inland Marine, LP ("Kirby") -- have been identified as a party responsible for a vessel or facility that discharged oil as a result of the Incident.

Due to the discharge of oil from the Texas City Y Spill, there is a potential for injury to, destruction of, loss of, or loss of use of natural resources. Under the Oil Pollution Act ("OPA"), 33 U.S.C. 2701 *et seq.* and the Natural Resource Damage Assessment Regulations (15 C.F.R. Part 990) promulgated pursuant to OPA, NOAA and its co-Trustees have authority to conduct an assessment of injuries to its trust resources which may have been caused by the oil spill. Section 2702(b)(2)(A) of the OPA additionally states

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<sup>1</sup> KIRBY BARGE 27705 and KIRBY BARGE 27706 were both in tow by the M/V MISS SUSAN at the time of the collision.

that the Trustees are entitled to recover not only damages related to natural resource injuries but “the reasonable costs of assessing the damage.”

By this letter, including the attached assessment plan and cost estimate, and pursuant to 33 U.S.C. Section 2713, NOAA presents to Kirby and its representatives a claim for \$43,571.00 for NOAA's estimated future costs to implement assessment procedures associated with potential bottlenose dolphin injury caused by the spill.

#### Cooperative Assessment Agreement Among the Parties:

Following the Incident, Trustees and Kirby (“the Parties”) negotiated a cooperative Memorandum of Agreement (“MOA”) to provide the structure under which they agreed to conduct a cooperative natural resource damage assessment and restoration planning process.<sup>2</sup> Under the terms of that MOA, the Parties agreed to make all reasonable efforts to complete the cooperative assessment process as expeditiously as practicable, targeting the end of calendar year 2016 for completion. The Parties also agreed that Kirby would reimburse or advance fund the Trustee's reasonable costs and finance cooperative studies in accordance with a detailed, formal process set forth in the MOA.

The cooperative MOA provides for monies to be deposited by Kirby into the Department of the Interior's Natural Resource Damage Assessment Restoration (NRDAR) Fund Incident Account (“the Account”) to fund Trustee assessment costs and expenses associated with the Incident that the Parties agree on. This includes 1) “Advance Funding prior to the MOA” to assure monies were and are available for the Trustees reasonable costs associated with the natural resource damage assessment process; 2) “Administrative Funds for ongoing Trustee costs and expenses”; and 3) “Advanced Funding for Cooperative Studies”. Costs incurred for studies performed out of the formalized cooperative assessment process are specifically not reimbursable nor recoverable through the cooperative MOA funding mechanism.

#### Assessment of Potential Injury to Bottlenose Dolphin:

The OPA NRDA regulations at 15 C.F.R. 990.27 establish standards for trustees to consider in the selection of potential assessment procedures. NOAA has considered those standards and has selected certain assessment procedures consistent with those regulations to determine and quantify potential injuries to bottlenose dolphins.

Following the Incident, and in consultation with the federal and state trustees and Kirby, NOAA -- as lead trustee for dolphins for this Incident -- presented a Trustee approved Plan in May, 2014 to Kirby and its contractors. That Plan was titled “*Natural Resource Damage Assessment for Bottlenose Dolphins Exposed to the Texas City Y Oil Spill*”.

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<sup>2</sup> Specifically, the MOA is between the Texas Parks and Wildlife Department (“TPWD”), the Texas General Land Office (“GLO”), the Texas Commission on Environmental Quality (“TCEQ”), NOAA and the United States Department of the Interior (on behalf of the U. S. Fish and Wildlife Service), (“the Trustees”) and Kirby Inland Marine, LP.

The 2014 Plan had a specific stated objective: "To provide support for the Texas Marine Mammal Stranding Network to collect and analyze tissues from stranded bottlenose dolphins to assess potential impacts of the Texas City Y Oil Spill on coastal/estuarine bottlenose dolphins." Further, the Plan stated its objective to "collect NRDA targeted samples, perform the NRDA-required sample handling and retention, and conduct histopathological analyses to determine whether there are lesions that may be consistent with oil exposure." Advanced funding approval was requested by NOAA in May, 2014 to perform analyses -- including biotoxin and PAH analyses to help determine cause of death or injury -- once samples were collected. However, a detailed budget for sample analysis could not be formulated at that time as it was impossible to predict how many dolphin strandings -- and how many subsequent dolphin samples -- would be present at the end of the sampling period.

NOAA's presentation of this 2014 Plan for collection and analysis of these dolphin samples led to several conference calls with Kirby, Kirby's contractors, co-Trustees and NOAA's dolphin experts. Reiterations of the Plan were discussed, technical questions were answered and emails between Trustee and Kirby attorneys occurred. However, in the end, Kirby agreed that NOAA could access only \$20,000 immediately from the \$500,000 Advance Funding account so that NOAA might proceed with sample collection in a timely manner. Kirby representatives only so agreed on the condition that "the current request does not cover any dolphin studies, tissue evaluation or other technical matters as the scope of any specific dolphin studies remains subject to further technical discussions and agreement."<sup>3</sup>

NOAA has completed the sampling protocols associated with the 2014 Plan and now needs to analyze the samples collected. NOAA has always been clear that its dolphin assessment must naturally include some analysis of the samples. Specifically, as in May, 2014, NOAA wishes in 2015 to conduct histopathological and other analyses to assess potential impacts on the targeted categories of dolphin most likely to have been negatively impacted by the Texas City Y Oil Spill.

Specific, known numbers of samples to analyze and a specific budget for those analyses are now available, as the sampling period has ended. A 2015 Sample Analysis Plan and associated budget for this work is attached for your consideration. NOAA has made every effort to limit the number of samples analyzed to only those absolutely necessary to determine injury within a reasonable time and cost frame. NOAA has additionally coordinated with its co-Trustees to ensure there is not duplication of effort in this matter. The total budget for this work is \$43,751.00.

#### NOAA Remains Receptive to Cooperative Assessment Discussions:

NOAA is of course willing, in line with its commitments under the MOA, to discuss the opportunity to perform these analyses cooperatively. Should Kirby wish to participate in Plan implementation, it can endorse the Plan and allow NOAA to access funding under the MOA provisions for Advanced Funding of Cooperative Studies. Under Cooperative Funding terms, NOAA is willing to share all documents collected to date, including

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<sup>3</sup> Molly Cagle email to Amy Horner, June 26, 2014.

confidential documents under a Confidentiality Agreement, analysis results, and, potentially, engage in cooperative interpretation of those results with Kirby. NOAA has expressed its willingness to enter into a Confidentiality Agreement with Kirby to share documents that may inform Kirby's decision on this matter, but NOAA is reluctant to enter into such data sharing on matters (dolphin studies, tissue evaluation or other technical matters) that Kirby insists lie currently wholly outside the terms of the MOA.

In short, given the inability of the Parties to come to cooperative agreement on the matter to date, and the Trustees' good-faith agreement to attempt to conclude the overall assessment by 2016, and the necessity to analyze the samples before NOAA can make a reasonable, informed determination as outlined in 15 C.F.R 990.41 and 990.42, NOAA feels it is necessary to proceed with these analyses expeditiously whether or not the Parties can reach cooperative agreement on the matter. The Parties agree in the MOA that "[n]othing in this MOA is intended to limit the scope of the natural resource damage assessment and restoration appropriate for the Texas City Y Spill, or to otherwise restrict or abrogate the authority or discretion of the Trustees to determine the scope of that assessment and restoration." As such – and while open to cooperative discussion on the matter -- NOAA currently seeks payment of these reasonable, projected assessment costs outside of the Advanced Funding and/or Cooperative Assessment Study protocols within the MOA.

#### Presentment of Interim Claim for Payment of Assessment Costs:

NOAA is hereby submitting an interim claim for reasonable assessment costs necessary to perform the sampling protocols outlined in its 2015 Sample Analysis Plan, in the amount of **\$43,751**. These costs are directly related to the Incident and shall be incurred while undertaking activities necessary to make reasonable and informed determinations as outlined in 15 C.F.R 990.41 and 990.42.

Under the OPA, all parties responsible for the spills are jointly and severally liable for these costs. NOAA is therefore simultaneously presenting this claim to other potentially responsible parties associated with this Incident, as appropriate.

This claim does not include any of NOAA's uncompensated past assessment costs incurred to date for quantifying the severity and extent of injured natural resources and services associated with the Incident. Unless advised otherwise, NOAA will continue to follow the protocols outlined in the MOA for reimbursement of ongoing assessment costs. Consequently, the claim presented herein is solely for estimated, interim assessment costs *related to dolphin sample analysis under the 2015 Sample Analysis Plan attached* and this presentment of demand should not be construed as the full and final claim from NOAA for the total costs associated with the NRDA it is conducting for the Incident. NOAA is coordinating with the other natural resource trustees who are conducting NRDA activities for the oil spill in an effort to avoid duplicative procedures and unnecessary costs for the Incident generally.

Pursuant to 15 C.F.R. 990.64, if you have not agreed to pay this demand within 90 days, NOAA may pursue the claim through other means, including judicial action.

Should Kirby and/or the other potentially responsible parties decline to pay the above claim, it is the intent of NOAA, in accordance with 33 U.S.C. Section 2713 (c) and (d), to make a claim for future assessment costs, of an identical amount, to the National Pollution Funds Center (NPFC) upon the expiration of ninety (90) days from the date of the presentment of this claim to Kirby. If Kirby decides, in less than 90 days, not to fund some or all of NOAA's future ecological assessment and restoration NRDA activities, please advise us at your earliest opportunity so we may avoid unnecessary delay in filing a claim with the NPFC to obtain funding for these activities.

Should you have any questions about this demand, please contact me at (301) 713-7445 or by email at [Sheila.O'Brien@noaa.gov](mailto:Sheila.O'Brien@noaa.gov).

Thank you for your consideration of this important matter.

Sincerely,



Sheila O'Brien  
Attorney-Advisor  
National Oceanic and Atmospheric Administration

Enclosures:

1. NOAA 2015 Proposed Sample Analysis Plan